

Superhuman Ethics: The Ethics of Industry and Issue Lawyering

*Who Is the Client and How Are Decisions Made?*¹

When a lawyer is engaged to represent a group, coalition, consortium, or other unincorporated association without an independent legal existence, there is first and foremost the fundamental question of whether the lawyer has a single “group” client or an aggregate of individual members/participants as joint clients. This is a question on which the lawyer must establish clarity.

Under Rule² 1.13(a), a “lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Comment 1 to this rule refers to an organizational client as a “legal entity.” In this way, Rule 1.13 sets a baseline expectation that entities with independent legal existence – e.g., a corporation, partnership, limited partnership, limited liability partnership, or limited liability corporation -- are presumptively “the client.” *See also, Restatement (Third) of the Law Governing Lawyers* § 96(1) cmt. (b) (2000) (“The so-called ‘entity’ theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations.”).

Presumptively is the key word here, since there are numerous scenarios in which a lawyer can also be found to have acquired members or constituents of those legal entities as clients, whether intentionally or unintentionally. For example, in a closely held corporation, decision-making authority may be controlled by one or two shareholders that look to the lawyer to provide advice on a broad range of topics for which there is substantial identity of interest between the entity and the shareholder. Section 14 of the Restatement of the Law Governing Lawyers defines a “client” as a person who manifests an intent for the lawyer to provide legal services *if* the lawyer knows that the person reasonably relies on the lawyer to provide legal services but the lawyer fails to disclaim an intent to do so. The lawyer may believe that advice is sought by and for the closely held corporation but the shareholder asking the questions may not make that distinction. *See generally, Darian M. Ibrahim, Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 Ala. L. Rev. 181 (Fall 2004). *See also, William Freivogel, Freivogel on Conflicts: A Guide to Conflicts of Interest for Lawyers (Corporations)* at <http://www.freivogelonconflicts.com/corporations.html> (identifying cases in which the court found that the lawyer did have a duty to constituents of a close corporation client).

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² References to “Rule” means the ABA Rules of Professional Conduct unless otherwise noted.

Those who come together outside of an entity with independent legal existence may presumptively be viewed as an aggregate of individuals in a joint client status. However, comment 1 also notes that the “duties defined in this Comment apply equally to unincorporated associations.” Moreover, ethics opinions have recognized that “lawyers for other types of entities do not necessarily represent the constituents.” Annotated Model Rules of Professional Conduct (Eighth Ed.), Ellen J. Bennett, Elizabeth J. Cohen, Helen W. Gunnarsson, p. 237, citing among other things ABA Formal Ethics Op. 92-365 (1992) (trade association’s lawyer does not automatically represent individual members, although circumstances in particular instance may support finding that lawyer-client relationship with individual member has arisen); DC Ethics Op. 305 (2001) (lawyer for trade association generally not prohibited from representing association or another client in matter adverse to member association, unless circumstances support member’s expectation of lawyer-client relationship); Or. Ethics Op. 2005-27 (2005) (lawyer for trade association may also represent one association member against another member, who is not present or former client, in matter unrelated to lawyer’s representation of association). *See also*, William Freivogel, *Freivogel on Conflicts: A Guide to Conflicts of Interest for Lawyers, Trade (and Other) Associations* at <http://www.freivogelonconflicts.com/tradeassociations.html>.

The distinction between the “enterprise” vs. “aggregate” theories will impact the “default” resolution of a variety of issues,³ such as:

- Who must the lawyer share information with? (R. 1.4, 1.6, 1.13, 1.16)
- Who must the lawyer shield information from? (R. 1.6)
- Who gets to fire the lawyer? (R. 1.16(a)(3))
- Who gets to sue the lawyer? (R. 1.1, 1.2)
- Whose information is the lawyer getting and how is the lawyer getting it? (R. 1.6)
- If they ask, who has the right to demand the lawyer’s file? (R. 1.16(d))
- Who is the lawyer going to avoid conflicts with as a result of this work? (R. 1.7, 1.8, 1.9)
- Who is obligated to pay the lawyer, and is consent is needed for a third party payor? (R. 1.8)

(Does not have to be the client, but if it is not the client, then see R. 1.8(f): A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference

³ Please note that there are issues of potential liability, tax consequence, right to transact business, right to file as a party in litigations, and many other issues that could affect a group or association that comes together for a common purpose. Those issues are beyond the scope of this article and CLE, which focuses on the issues arising under professional rules applicable to lawyers, except to point out that Rules 1.1, 1.3, and 1.4 require a lawyer to be competent, diligence, and communicative on these issues. The lawyer may need to be clear about limiting the scope of the representation in a way that excludes advice on these topics or may need to consult with or refer the group to counsel with the right knowledge and experience to advise on such issues.

with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.)

- Who is directing the lawyer's work, making decisions? (R. 1.2, 1.13)

In many cases, whether the “enterprise” or “aggregate” approach is taken, a lawyer can still change the “default” outcome with appropriate engagement and consent documentation. The point is that it must be anticipated and addressed to do so. Accordingly, even more important than simply declaring an “enterprise” or “aggregate” approach is conferring with the client or clients about the pros and cons of information sharing, conflicts analysis, decision-making, engagement and disengagement, entry into and exit from the group, and payment issues and assist the client in documenting a clear understanding as between and among the lawyer and the participants in the group. This may go beyond traditional engagement letter issues and into assisting the group form organizational documents that will be well worth the “ounce of prevention” in managing expectations.

Just as partnership or LLC agreements should anticipate and address how decisions are made and the comings and goings of partners or members and even dissolution of the entity itself, some combination of the engagement letters and organizational documents should likewise anticipate and address similar issues. Although not all advisable topics for a partnership or LLC agreement are necessary for “unincorporated” issue or industry groups, lawyers are well advised to review samples and checklists for forming partnerships, LLCs, and the like to draw from the collective experience on the types of issues to anticipate and address. See, e.g.,

- Partnership Agreement Checklist at: <https://www.gabar.org/committeesprogramssections/programs/lpm/upload/pac.pdf>
- Nellie Akalp, *7 Things Every Partnership Agreement Needs to Address*, Forbes (October 8, 2016) at <https://www.forbes.com/sites/allbusiness/2016/10/08/7-things-every-partnership-agreement-needs-to-address/#3263bc323373>, and Nellie Akalp, *What Should Your LLC's Operating Agreement Include?*, Score (June 1, 2017) at <https://www.score.org/blog/what-should-your-llcs-operating-agreement-include>

The level of detail required to anticipate and address issues will likely depend on whether the group will be a short- or long-lived group. Is the group coming together only to file an amicus brief? Then an engagement letter that addresses information sharing, payment terms, and what happens on conflict issues will suffice. Is the group coming together on a more sustained basis to monitor, report on, and engage in long-term advocacy on industry-impacting issues? Then, ensuring that the group has more detailed plans for addressing the longer list of issues through organizational documents and engagement letters will ensure that the lawyer's representation of the group stands up to a lawyer's duties under professional rules and persists over time as a group.

Whether in an engagement letter or some type of organizational document such as a membership agreement, for a lawyer to have authority to act for the group, the group needs to have “duly authorized constituents” (see Rule 1.13(a)) who can direct the lawyer's work on behalf of the group. Under Rule 1.2, a “lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” As comment 2 to Rule 1.2 recognizes, lawyers and clients may

sometimes disagree about the means to be used to accomplish the client's objectives. If a lawyer is representing a group – whether on an enterprise basis or as an aggregate of individuals – the potential for disagreement about objectives and means multiplies. Notwithstanding the acknowledgement about the potential for disagreements, Rule 1.2 does little to chart a course for resolving disagreements: “Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.” Comment 2 to Rule 1.2. Thus the lawyer who fails to specify from whom or how the lawyer will take direction from “duly authorized constituents” will by “default” need to communicate with all members and on all questions regarding the objectives of the representation, the expense to be incurred, and how to navigate concern for third person who might be adversely affected and seek unanimous decision-making from the client. *Id.*

In terms of having a group that can effectively make decisions and direct a lawyer's work, a key issue is whether the group chooses to require unanimity or merely requires consensus to take action. A group that requires unanimity allows each member of the group a “veto power” that can effectively thwart action. A group may require “unanimity” if members prioritize control of the advocacy and fear serious consequences for association with a group from which its interests diverge. But a group that prioritizes unanimity should likewise provide for member “exits” – voluntary or involuntary – or risk paralysis and frustration of the purpose for which the group formed. For a group that will exist over time, consensus decision-making through a defined process is more workable. However, a group that selects consensus decision-making should consider defining some basic criteria for membership to safeguard against the risk that the “majority” will have materially different priorities than the minority. For example, a group formed to monitor legal develops or to advocate industry-based positions would want to specify that members must have a particular role in that industry to maximize the likelihood that the member interests will generally align. For example, a group focused on rules that affect the electric power industry may want to specify that members must be power generators, or power distributors, or similar such qualifications.

Because the group dynamic amplifies the challenges associated with potential disagreement and decision-making between and among the lawyer and client or clients, a lawyer necessarily plays a proactive role. Rather than more passively following the client's direction, the lawyer must proactively shape decisions in close consultation with the group's members or “authorized constituents.” Indeed, lawyers may be catalysts for the group's formation to begin with, demonstrating how clients with similar interests can more economically monitor and impact development of the law as it affects their interests and providing clients a forum to harness a more powerful voice in shaping the law. The Preamble to the ABA Model Rules of Professional Conduct, cmts. 6, envision a proactive role for lawyers as members of a “learned profession” to “seek improvement of the law” and “employ that knowledge in reform of the law.” The Preamble, cmt. 1, recognizes that in service of clients, a lawyers will function as a counselor, advisor, advocate, negotiator, and evaluator in order to advance the group's mission.